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In The Supreme Court Of The United States

October Term, 1967
No. 521

JAMES WILLIAM HOOPER
Petitioner
vs.
STATE OF OHIO
Respondent

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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To the Supreme Court of Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The Petitioner, James William Hooper, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio made and entered by said Court by Journal Entry filed on the 27th day of March, 1967, a copy of which is attached hereto as Appendix I.

OPINIONS OF THE COURT BELOW

No opinion was rendered by the Trial Court, other than the mere determination of guilt. The Ohio Court of Appeals upon consideration of an appeal to it did render an opinion which was not published; the same is incorporated herein as Appendix III. The Supreme Court of Ohio did not render either an official or unofficial opinion, save a mere journal entry affirming the judgment of the Trial Court and Appellate Court.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS REVOKED

The jurisdiction of this Court is invoked under Title 28, USCA Section 1257 (3), which section pertinently provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows: * * *, (3) by writ of certiorari* * *, or where any title, right, privilege or immunity is specially set up is claimed under the constitution."

This cause also involves a violation of the Fourth, the Sixth and the Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED FOR REVIEW

I

Is the alleged confession of an accused admissible in evidence when the accused denies being advised of his constitutional rights and when there is no showing of his waiver of counsel during interrogation by police?

II

Are the statements obtained from an accused after an illegal arrest, when the accused is being held without legal process, admissible after objection and motion to suppress?

III

Is an accused's rights to a fair trial abridged when his constitutional privilege to secure witnesses in his own behalf is denied because the court improperly believes that a witness for the defendant has been convicted of a felony thereby barring him from testifying?

IV

Is a statute constitutional which presumes guilt upon the commission of two coinciding acts which two acts may be lawful?

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by a law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

James William Hooper, the petitioner, was charged and convicted of a violation of Revised Code of Ohio Section 4511.251, wherein it was charged that on the 19th day of September, 1965, he did operate his motor vehicle over and upon a public highway and did participate in a drag race.

Prior to the trial, the petitioner moved to suppress an alleged confession which confession had been obtained in violation of the constitutional prohibition against illegal arrest and also where there was no waiver of defendant's right to counsel during interrogation. Also, it was contended that the use of such evidence obtained following an illegal arrest was in violation of the Constitution and by that authority inadmissible in a state court. This motion following a full hearing was denied and on the merits, the judgment herein being challenged was rendered. Petitioner was then sentenced.

In proper time, this petitioner appealed this cause: First, to the Ohio Court of Appeals, which affirmed this judgment (Appendix II). The Supreme Court of Ohio affirmed the conviction without opinion.

After the motions to suppress the evidence; to dismiss the affidavit; and to quash, were overruled in the Trial Court and prior to the trial, a petition for Writ of Prohibition was filed in the Court of Appeals which was denied without opinion.

STATE OF THE PROCEEDINGS AT WHICH, AND THE MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED

Prior to trial, petitioner filed a motion to suppress the evidence on the grounds that his arrest and sub-

sequent questioning were illegal and unconstitutional. The issues were briefed and argued in the Trial Court, the Ohio Court of Appeals, both on the appeal on the merits and previous to this on a Petition for Writ of Prohibition then on appeal to The Supreme Court of Ohio. The Supreme Court of Ohio did not render a formal opinion but the Appellate Court stated "As far as we know, the United States Supreme Court has not passed on this specific question." "It is our opinion that an illegal arrest does not affect statements and admissions given by a defendant after such arrest that are voluntarily given after his being advised of his constitutional rights."

ARGUMENTS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Specific questions raised in the motion to suppress and dismiss the affidavit and the petition for Writ of Prohibition in the Appellate Court are essentially this:

1. Was the arrest of the petitioner legal, since the act complained of was a misdemeanor and the defendant was not found by the arresting officer to be in violation of the law at the time of his arrest. If this arrest was in fact, not legal, then should the motion to suppress the evidence obtained be sustained by reason of the constitutional guarantees against illegal seizure. With a valid warrant, a police officer can arrest for a felony or a misdemeanor. It makes no difference whether or not the crime is committed in his presence. Probable cause in such instances is predetermined or at least should have been. Article IV, U. S. Constitution; R. C. of Ohio, Section 2933.22.

The method and time of executing an arrest warrant are set forth in our statute, R. C. of Ohio, Section 2935.12, compliance to which is mandatory. On the other hand, many incidental searches, in all other re-

spects reasonable, have been held "unlawful" for failure to comply with the provisions concerning notification to arrestee of purpose and authority. *Miller vs. U. S.*, 357 U. S. 301 (1958).

In Ohio, as elsewhere, a police officer may arrest for any crime, felony or misdemeanor, committed in his presence. Revised Code of Ohio, Section 2935.03. This right to arrest for a crime not committed in the presence of the police officer is strictly limited for the protection of the public. Thus, a police officer may never arrest for a misdemeanor not committed in his presence. Every such arrest is invalid as is every incidental search.

Our statutes in Ohio also specify when and how a warrantless arrest may be made for crimes not committed in view of an officer. Accordingly, Revised Code of Ohio, Section 2935.04 provides in substance that: when a felony has been committed, or there is reasonable grounds to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of such offense, and detain him until a warrant can be obtained. *5 Ohio Jur. (2d)*, Arrest, Section 25, pp. 38-39.

To sum up—if the crime is committed in the presence of the police officer he may arrest without a warrant for felonies or misdemeanors. When not committed in his presence, he may make such arrest only if he has probable cause to believe the person arrested committed it. If the arrest is not expressly sanctioned by statutes, the arrest is unlawful and as a consequence the interrogation unreasonable.

Probable cause is not sufficient, however, in misdemeanors, here the arresting officer must find the person in the actual act of committing the violation complained of. The real test should always be whether information possessed by the police officer, from personal observation, or from hitherto reliable informants

would be sufficient to justify the issuance of a warrant of arrest by a neutral magistrate.

2. Is the brief statement by the arresting officer who interrogated this defendant that he "assured him" he was allowed an attorney; "instructed him of his constitutional rights—that anything he would say could be used in a court of law* * *" without any statement of a waiver by the defendant to counsel; is this a waiver of counsel as set forth in *Miranda vs. Arizona* 86 *S. Ct.* 1602 (at 1628) (384 U. S. 436).

IA

WHERE AN ARREST IS NOT SANCTIONED BY LAW AN ARREST IS ILLEGAL

The transcript of the trial evidence hereinafter referred to as (R) shows as follows:

Ohio Revised Code Section 4511.251, which is known as the drag racing statute and the statute under which this defendant was prosecuted, is a misdemeanor.

Ohio Revised Code Section 2935.03 is as follows:

> "A sheriff, deputy sheriff, marshal, deputy marshal, watchman, or police officer shall arrest and detain a person found violating a law of this State, or an ordinance of a municipal corporation, *until a warrant can be obtained.*
>
> A constable within the limits of the township in which said constable has been appointed or elected, shall arrest and detain a person found by him in the commission of a misdemeanor, either in violation of the law of the state or the ordinance of a village *until a warrant can be obtained.*"
>
> (Emphasis added)

The transcript of pleadings in this case clearly shows that at no time even to date has a warrant been issued nor has a summons been issued against the defendant herein. This petitioner was arrested without a warrant.

IB

ADMITTING AN ALLEGED CONFESSION INTO EVIDENCE OBTAINED WHEN DEFENDANT HELD WITHOUT LEGAL PROCESS IS ILLEGAL

Cross Examination of Sheriff Sulsberger

"Q. Did you have a warrant for the arrest of the defendant when you arrested him?

A. No. When I first arrested him, I didn't." (R13)

After this arrest for a misdemeanor was made without a warrant, the defendant was confined in the county jail and a statement obtained, which is as follows:

"I, James William Hooper, do hereby make the following statement of my own free will and accord concerning wreck which occurred on/at North Main Street, Woodsfield, on the 19th day of September, 1965, at 4:00 A.M.

I saw the car coming around me so I start to stop. Then he hit the tree then came back out and hit me. Then he hit the next tree and I stop and come back to the wreck and see how bad he was hurt then I sent someone to get help."
(Def. Ex. 1; 11, 134e)

IC

CONFESSION OBTAINED WITHOUT WAIVER OF RIGHT TO COUNSEL NOT ADMISSIBLE

The defendant-petitioner allegedly later gave a very damaging statement to the sheriff. The same was received in evidence after motion of counsel for the defendant to suppress this had been overruled. The sole testimony as to whether or not the statement was voluntary and if proper waiver of counsel was made by the defendant is as follows:

DIRECT EXAMINATION OF SHERIFF SULSBERGER
(Arresting and questioning officer) (R7)

"Q. Would you make known to the jury the result of the questioning and examination?

A. I didn't talk to Mr. Hooper at length that particular morning. Four-thirty or five o'clock when I brought him in; but the next day, little after noon, after I checked with the Barnesville Hospital as to the condition of Mr. Eikleberry I did talk to him again. I explained the seriousness of the accident and what could develop. At that time I assured him he was allowed an attorney; instructed him of his constitutional rights—that anything he would say could be used in a court of law. He voluntarily gave me his version of what happened. He told me that—

MR. SHERRY: Object to the conclusion of law "voluntarily."

THE COURT: The objection will be sustained. The Court will instruct the jury the voluntariness of the statement is for their determination."

Q. Did you make a—did he make a statement?

A. He did.

Q. Tell us what that was.

A. He was at the Corner Grill at Malaga earlier—Malaga, Ohio. He sat with some friends. He had nothing to drink outside of Pepsi Cola, which I believe this young gentleman. He stated who the friends were, and when he left the Corner Grill that night, that particular morning, around three in the morning, there was another party there—Carl Eikleberry. He stated Mr. Eikleberry had a beer or so. He said, "Lord only knows how many

he had before he came to the Corner Grill." He told me after he left with Mr. Weyrick in his vehicle, who he was with at the time, because previous to this, in the City of Woodsfield, Patrolman Caldwell had stopped Mr. Hooper and informed him to park his vehicle or not to drive it because of the muffler, so he told me he parked in front of Diehl's or in the vicinity of Diehl's Shoe Store. On the way back, he said about a half mile probably out of Malaga Mr. Eikleberry passed them at a high rate of speed. He said they didn't catch up any more until they got to Goose Neck Hill, that's on the northern outskirts of Woodsfield. He said they went to the location of his vehicle, which was at Ludwig's Insurance in that vicinity, Diehl's Store. He told me he stayed there for a while. Told me there was a couple of cars there. He didn't know either one of the boys. They had been circling the flag pole in their vehicles. They informed them they oughtn't to do that; the police would catch them. They sat there a while and then he said he got in his car, backed out and went north on 26 toward where the accident happened. Mr. Eikleberry followed behind. Went to the light at the Texaco Station and turned right down past the elementary school. Passed the city building and came back to the Square, and all this time Mr. Eikleberry was behind him. He turned left and went south on 8, South Main Street. He said that going out South Main Mr. Eikleberry passed him and he thought he had wrecked his car. Went completely sideways, the vehicle did. He turned at the slag pile, which you people observed. Turned there. They talked. Had a meeting of some kind. Talked, I guess. Started back toward Woodsfield. He told me starting out he was in the lead car when they left the

cinder pile out there—slag pile—whatever you want to call it. At that time Mr. Eikleberry caught up with him and they came completely through from the south end until they got to the flag pole—the flower garden—in the middle of the Square. They were doing better than seventy, side by side. When they got to the flower garden Mr. Eikleberry went to the left. He stayed to the right. They met on the opposite side. They came out together. They stayed beside each other until they got almost to the Texaco Station or the red light which you witnessed this morning, witnessed the scene this morning. Mr. Eikleberry passed him under the light, in the vicinity of the light. He said he had to cut his car back sharp because there were cars parked on the left. In doing so he lost control there. He swerved in front of Mr. Hooper; hit the first tree; ricocheted off; hit the Hooper car; ricocheted off the Hooper car and went back and hit the second tree.

Q. What you have just related, Sheriff, was a statement related by the defendant a few hours after the accident, or at noon?

A. Around noon. Little after dinner.

CROSS EXAMINATION OF SHERIFF SULSBERGER (R17)

"Q. What was the physical condition of Mr. Eikleberry at the time you took this statement, the unsigned statement, in your own handwriting? What was his physical condition?

A. I don't believe it was good.

Q. Did you tell Mr. Hooper—that's Jim, the defendant—that you were probably going to charge him with murder?

THE WITNESS: With murder?

MR. SHERRY: Yes.

A. No, I don't believe I did.

Q. You didn't?

A. No.

Q. Did you tell him in Stark County there had been a person convicted of killing someone from drag racing and that person was sentenced to the penitentiary for murder?

A. That is right."

CROSS EXAMINATION OF JAMES HOOPER (R113)

"MR. HOOPER: You want me to tell you what he said to me?

MR. BURKHART: Yes.

A. All right. All he said to me, "If Carl Eikleberry dies, you'll go to jail for Manslaughter," and asked me to give a statement."

From this brief amount of testimony regarding the matter of whether or not these admissions were voluntary the only Appellate Court which rendered an opinion states:

"It is our opinion that an illegal arrest does not affect statements and admissions given by a defendant after such arrest, that are voluntarily given after his being advised of his constitutional rights." (Appendix II)
(Note: The Appellate Court does not mention waiver of right to counsel)

The Appellate Court also held:

"However, an illegal arrest can affect evidence received as a result of such an arrest. When this happens a motion to suppress the evidence or a plea in abatement will lie. A motion to suppress the evidence was made in this case, and the question now before us in whether the testimony of the sheriff as to the statements and admissions made by the defendant is affected by an illegal arrest."

From the exclusive testimony of the Sheriff, set forth hereinbefore, "* * *I explained the seriousness of the accident and what could develop. At that time, I assured him he was allowed an attorney; instructed him of his constitutional rights—that anything he would say could be used in a court of law. He voluntarily gave me his version of what happened." (Direct Examination of Sheriff Sulsberger). (R7). From this testimony alone the Appellate Court held that this was a voluntary statement made after the defendant had been duly advised of his rights and the fact that the arrest was illegal did not render this alleged confession to be the illegal fruits of such illegal arrest and detention. The Appellate Court, it is noted, stated in its opinion that the Supreme Court of the United States had not ruled on this matter. We find this to be incorrect. This matter has been the subject of many court rulings, probably the most notable being *Wong Sun vs. United States, 83 S. Ct. 407 (374 U. S. 471)*. As has been pointed out, defendant's motion to suppress the evidence of Sheriff Sulsberger pertaining to the proported confession was denied and has been previously referred to herein, there is absolutely no testimony of any kind which would constitute a waiver on the part of the defendant herein to make a statement that he did not want an attorney.

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. State of Illinois, 378 U. S. 478, 490, n. 14, 84 S. Ct. 1758, 1764, 12 L.Ed.2d 977. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U. S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and we reassert these standards as applied to incustody

interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in Carnley v. Cochran, 369 U. S. 506, 516, 82 S.Ct. 884, 890, 8 L.Ed. 2d 70 (1962), is applicable here:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."* * *

Miranda v. Arizona 86 S.Ct. 1602 (at 1628) (384 U. S. 436)

Further, the question as to whether or not this is a voluntary statement: (R7)

> MR. SHERRY: Object to the conclusion of law "voluntarily."
>
> THE COURT: The objection will be sustained. The Court will instruct the jury the voluntariness of the statement is for their determination."

This statement to the jury that the question of whether or not the confession was voluntary is such error that this in and of itself is basis for judgment to be set aside and reversed even if this were the only error.

II

DENIAL OF DEFENDANT TO TESTIMONY OF DEFENSE WITNESS ILLEGAL

Petitioner's third question presented for review concerns the following sequence involving the Trial Court and Gary Stewart, a witness for the defendant. (R56)

"THE COURT: Have you ever been convicted of a felony?

THE WITNESS: What do you mean?

THE COURT: I think you know what it means. Have you done time?

THE WITNESS: Yes.

THE COURT: *Mr. Sherry, don't bring this kind of witness into my Court. The jury is instructed to disregard the entire testimony of this witness.*"

(Emphasis Added)

The Court of Appeals, in reviewing this and in their opinion, stated as follows:

"We feel that the above question and comments of the Trial Court are clearly improper and were error."

This Court held, however, that this was not "Prejudicial error."

Further, Ohio Revised Code, Section 2945.42 provides:

"No person is disqualified as a witness in a criminal prosecution by reason of his interest in the event thereof as a party or otherwise, or by reason of his conviction of crime.* * *"

III

STATUTE ALLOWING INFERENCE UPON INFERENCE TO PROVE GUILT ILLEGAL

An examination of the Ohio Revised Code Section 4511.251 discloses that the operation of two or more

vehicles side by side, at speeds in excess of the prima facie lawful speed limit, shall be prima facie evidence of drag racing and to establish this, the prosecution need not prove competition as contained in the definition of drag racing in the first portion of this section of the code. In determining this, the following must be considered: In the State of Ohio, under the provisions of 4511.21 of the Revised Code, there is no fixed speed limit. *(See Robinson vs. Ferguson, 105 Ohio App. 311).*

In view of the foregoing, it is apparent that this statute contains a presumption on a presumption, that first, speed in excess of a prima facie speed is unlawful per se and this speed by two vehicles side by side is drag racing per se. In short, if two cars are driving side by side and proceed side by side and should exceed the prima facie lawful speed limit by any amount, must these motorists be put in a position of proving that they were not drag racing? Keeping in mind that under the law of the State of Ohio that they might not even be guilty of a violation of law under the prima facie speed law.

It is well-established that the Legislature has the power to prescribe the rules of evidence and may provide that certain facts be prima facie and presumptive evidence of other facts if there is a natural and a rational relationship between the facts proved and those presumed. This rule is further qualified by the proposition that the Legislature cannot constitutionally make one fact conclusive evidence of another material fact in controversy, if the former is not of itself, by virtue of its own force conclusive; and this is specially true in criminal cases.

The Legislature of Ohio is attempting in the third sentence of paragraph (a) 4511.251 Revised Code, to support a rebuttable presumption on a rebuttable presumption and attempting to make one fact conclusive

evidence of another material fact and controversy, where by its own virtue, is not conclusive.

"Drag racing defined; prohibited on public highways.

(A) Drag racing is defined as the operation of two or more vehicles from a point side by side at accelerating speeds in a competitive attempt to outdistance each other or the operation of one or more vehicles over a common selected course, from the same point to the same point, wherein timing is made of the participating vehicles involving competitive accelerations or speeds. Persons rendering assistance in any manner to such competitive use of vehicles shall be equally charged as the participants. The operation of two or more vehicles side by side either at speeds in excess of prima facie lawful speeds established by divisions (a) to (g), inclusive, of section 4511.21 of the Revised Code or rapidly accelerating from a common starting point to a speed in excess of such prima facie lawful speeds shall be prima facie evidence of drag racing.

(B) No person shall participate in a drag race as defined in division (A) of this section upon any public road, street or highway in this state."
Ohio Revised Code Sec. 4511.251

CONCLUSION

Where defects and methods employed by the police which may be over zealous to bring about the conviction of an accused assailed, it does pose difficulty for the judiciary. History has, of course, demonstrated that the zeal of our police, in the great State of Ohio, does not always conform to constitutional standards; Mapp vs. Ohio 81 S.Ct. 1684 (1961), Haley vs. Ohio 332 U. S. 596 (1958), Beck vs. Ohio 85 S.Ct. 223.

Specifically, the defendant's rights were violated in the following manner: He was arrested without an

affidavit being signed or without a warrant or a summons being issued when the arresting officer did not see a misdemeanor being committed or did not find one in the process of being committed. The ultimate charge was for a misdemeanor.

No warrant or summons was ever issued for the defendant. The testimony of one of defendant's witnesses was removed from the consideration of the jury and stricken from the record because the court erroneously believed that this witness had been convicted of a felony, even if said witness had been convicted of a felony, this would not have affected his right to testify or for the right of the defendant to use his testimony in his behalf.

The alleged confession of the defendant was admitted and received in evidence over motion to suppress, when the same had been obtained without the defendant having waived his right to counsel during the interrogation; and when defendant was being held without process. Apparently, by its failure to review the decision of the Ohio Appellate Court, the Supreme Court of Ohio has adopted as law the views contained therein. This is most disturbing since these views taken by the Appellate Court are contrary to both the Constitution of Ohio and the Constitution of the United States.

It is, therefore, respectfully requested that a Writ of Certiorari be issued under the seal of this Court to the Supreme Court of Ohio to the end that the judgment of the Supreme Court of Ohio may be reviewed and reversed.

ALLAN SHERRY

Attorney for Petitioner

APPENDIX I

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO AFFIRMING JUDGMENT OF THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Monroe County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.
Filed: 3-27-67

APPENDIX II

JOURNAL ENTRY, COURT OF APPEALS OF OHIO, SEVENTH DISTRICT, COUNTY OF MONROE

This cause came on to be heard on the appeal on questions of law from the judgment of the Monroe County Court and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant and therefore the judgment of the Monroe County Court is affirmed and it is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Monroe County Court to carry this judgment into execution.

APPENDIX III

OPINION OF THE COURT OF APPEALS OF OHIO

LYNCH, J.

This is a law appeal by defendant-appellant from his conviction in the County Court for a violation of Section 4511.251 of the Revised Code relating to drag racing.

Defendant's first assignment of error is that Section 4511.251, Revised Code, is unconstitutional. We decided this issue in State of Ohio v. Donald Givens Goodman, 8 Ohio App. (2d), in which we held that this statute is constitutionally valid.

Defendant's second assignment of error concerns the arrest of defendant without a warrant being issued. The sheriff was summoned to the scene of an automobile accident, where he observed two cars within approximately forty feet of each other. The driver of one car which was wrecked was Carl Eikleberry, who was injured with a broken arm. The sheriff measured the skid marks at the scene of the accident and talked to defendant who admitted being the driver of the other car.

Defendant gave a signed statement that Mr. Eikleberry's car passed his car; that Mr. Eikleberry's car struck a tree, ricochetted off and hit the right side of defendant's car and then ricochetted off and hit a second tree.

The sheriff arrested defendant and took him to jail. The accident occurred about 4:00 a.m., on a Sunday morning. Later in the day at approximately 12:30 p.m. the sheriff talked to defendant who told him in detail what he was doing the night before. It is to the statements and admissions made by the defendant to the sheriff at this time while incarcerated in jail that defendant directed a motion to suppress the evidence.

The sheriff testified that before he talked to the defendant he advised defendant that he was allowed to have an attorney, instructed defendant as to his constitutional rights and advised him that anything he would say could be used in a court of law. The trial court overruled defendant's motion to suppress the evidence, and the sheriff testified as to the statements and admissions that defendant made to him.

Prior to this trial, during the trial and at the end of the trial, defendant moved to quash the affidavit and suppress the evidence for the reason that defendant was arrested for a misdemeanor not committed in the presence of the arresting officer and without a warrant having been previously issued.

The applicable statute on arrest is Section 2935.03, Revised Code, which provides in part as follows:—

> "A sheriff, deputy sheriff, marshal, deputy marshal, watchman, or police officer shall arrest and detain a person *found* violating a law of this state, or an ordinance of a municipal corporation, until a warrant can be obtained." (Emphasis ours).

As a general rule, a police officer cannot arrest, without a warrant, a person for a misdemeanor which was not committed in his presence or view. Cincinnati v. O'Neal, 3 Ohio App. (2d) 139, 5 Ohio Jurisprudence (2d) 33, Arrests, Section 21; 5 Am. Jurisprudence (2d) 720, Arrest, Section 30; 6 Corpus Juris Secundum 593, Arrest, Section 6.

The second syllabus of Bock v. City of Cincinnati, 43 Ohio App. 257, is as follows:—

> "To justify arrest without warrant, officer must believe offense is being committed and must believe on evidence of his own senses in case of misdemeanor and in case of felony on credible evidence of other persons."

The Supreme Court of New Jersey in State v. Murphy, 134 A. 900, held that an arrest without warrant for driving while intoxicated was not illegal where the officer came to the scene of an accident and found defendant near one of the cars in an intoxicated condition and the defendant admitted that he was driving.

The prosecutor contends that the evidence that the sheriff found at the scene of the accident was sufficient to establish the commission of a misdemeanor and to justify the arrest of defendant by the sheriff.

We do not feel that the legality or illegality of this arrest is decisive under the facts of this case. Assuming, without deciding this question, that the arrest of the defendant by the sheriff was illegal in this case, we hold that defendant's rights were not prejudiced as to the issues that have arisen out of the trial of this case.

We hold that defendant's motion to quash the affidavit has no merit. The affidavit in this case was in proper form, and the record indicates that the defendant was served a copy of this affidavit.

Article I, Section 10, of the Ohio Constitution provides in part as follows:—

> "* * * In any trial, in any court, the party accused shall be allowed * * * to demand the nature and cause of the accusation against him, and to have a copy thereof."

Section 2935.10, Revised Code, provides in part as follows:—

> "Upon the filing of an affidavit or complaint as provided by section 2935.09 of the Revised Code, * * *.
>
> "If the offense charged is a misdemeanor or violation of a municipal ordinance, such judge, clerk, or magistrate may:
>
> "(A) Issue a warrant for the arrest of such a person, directed to any officer named in section 2935.-03 of the Revised Code but in cases of ordinance violation only to a police officer or marshall or deputy marshall of the municipal corporation;
>
> "(B) Issue summons, to be served by a peace officer, bailiff, or court constable, commanding the person against whom the affidavit or complaint was filed to appear forthwith, or at a fixed time in the future, before such court or magistrate. Such summons shall be served in the same manner as in civil cases."

Thus, when an affidavit is filed, a warrant may be is-

sued but is not required. The accused can be served by summons as was done in this case.

In Schwartz v. State, 1 Ohio Law Abstract 521, the court held that a motion to quash may be made only where there is a defect apparent upon the face of the record, including the defects in the form of the affidavit or in the manner in which the offense is charged. See Section 2941.54, Revised Code.

We hold that an illegal arrest does not, in itself, invalidate an affidavit filed in a misdemeanor and is not a proper ground to sustain a motion to quash the affidavit.

However, an illegal arrest can affect evidence received as a result of such arrest. When this happens a motion to suppress the evidence or a plea in abatement will lie. A motion to suppress the evidence was made in this case, and the question now before us is whether the testimony of the sheriff as to the statements and admissions made by the defendant is affected by an illegal arrest.

It is clear that evidence that has been obtained by a search and seizure from an illegal arrest is inadmissible because of a violation of the right against unreasonable searches and seizures provided by the Fourth Amendment of the United States Constitution and Article I, Section 14, of the Ohio Constitution. Mapp v. State of Ohio, 367 U. S. 643, 6 L. Ed. (2d) 1081, 81 S. Ct. 1684, 16 Ohio Opinions (2d) 384, 86 Ohio Law Abstract 513, 84 A. L. R. (2d) 933; Beck v. State of Ohio, 379 U. S. 89, 13 L. Ed. (2d) 142, 85 S. Ct. 223, 3 Ohio Misc. (2d) 71.

However, the evidence at issue in this case that resulted from this arrest was not physical evidence obtained by a search and seizure. Thus, this case does not come under the Fourth Amendment of the United States Constitution but under the Fifth and Sixth

Amendments which protect a person from being a witness against himself and provide that the accused has the right to have the assistance of counsel for his defense. In this case, the defendant was advised of his constitutional rights and voluntarily gave statements and admissions to the sheriff. As far as we know, the United States Supreme Court has not passed on this specific question. It is our opinion that an illegal arrest does not affect statements and admissions given by a defendant after such arrest that are voluntarily given after his being advised of his constitutional rights.

Defendant's third assignment of error concerns the following sequence involving the trial court and Gary Stewart, a witness for defendant, (R. 56):—

> "The Court: Have you ever been convicted of a felony?
>
> "The Witness: What do you mean?
>
> "The Court: I think you know what it means. Have you done time?
>
> "The Witness: Yes.
>
> "The Court: Mr. Sherry, don't bring this kind of witness into my court. The jury is instructed to disregard the entire testimony of this witness."

We feel that the above question and comments of the trial court are clearly improper and were error. The question is whether it was prejudicial error. Section 2945.83, provides as follows:—

> "No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:
>
> "* * * (C) The admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudice thereby; * * *"

Gary Stewart was either present or in the vicinity of the place where the alleged drag racing took place prior to and at the time such alleged drag racing occurred. Defendant's attorney asked this witness several leading questions as to whether Gary Stewart was drag racing with Cy Weyrick at approximately the same time and place that the alleged drag racing for which defendant is charged occurred. The witness refused to answer on the ground that such answers would tend to incriminate him, apparently on the advice of defendant's counsel.

The prosecuting attorney should have objected to the leading questions of defendant's attorney, and the trial court could have sustained such objections and either prevented or excluded such testimony from coming into the case. However, this was not done.

The obvious purpose of defendant's attorney in presenting Gary Stewart as a witness was to establish that Cy Weyrick and Gary Stewart were drag racing at approximately the same time and place as the defendant allegedly was, and that the cars that Cy Weyrick and Gary Stewart were driving were similar in make and color to the cars which defendant and Carl Eikleberry were driving. Apparently, defendant feels that the proof of this fact would establish that defendant and Carl Eikleberry did not engage in drag racing.

The evidence from other witnesses makes it clear that Cy Weyrick and someone else had engaged in drag racing at the same place. However, it was prior in time to the drag racing in which defendant and Carl Eikleberry were implicated. There is sufficient evidence in the record to sustain the jury's verdict that defendant and Carl Eikleberry were engaged in drag racing independent of that in which Cy Weyrick and someone else were involved.

We, therefore, hold that defendant was not prejudiced by this error.

We have considered the other assignment of errors of defendant but find them without merit.

Judgment affirmed.

Johnson, P. J., Concurs.

Jones, J., Concurs.

Approved

JOHN J. LYNCH
Judge.